Supreme Court, U.S.
FILED
AUG 11 1992
OFFICE OF THE CLERK

No. 92-117

In The

Supreme Court of the United States

October Term, 1992

BLUE JEANS EQUITIES WEST,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Three

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER, BLUE JEANS EQUITIES WEST

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER, BLUE JEANS EQUITIES WEST

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioner, Blue Jeans Equities West. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose

of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board has authorized PLF participation in this case.

Amicus seeks here to supplement the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases before this Court involving issues arising under the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and this Court's decision in *Nollan* is central to the issues presented here.

By classifying *Nollan* as a physical invasion case, the court below has established a precedent which can only add great confusion to an area of the law already difficult for most practitioners and trial courts.

The public interest in clarifying and resolving the proper scope of *Nollan's* exaction rules is magnified by the fact that local agencies throughout the land, seeking to enhance revenues, are increasing their efforts to justify development fees as a means of financing public programs. If this type of exaction is to be immunized from *Nollan's* constitutional principles, such a conclusion

should be reached by this Court and uniformly applied throughout the Nation. The primary concern of this amicus, however, is that the holding below sets a precedent which seriously erodes the constitutional concept of property rights by permitting regulatory agencies to accomplish indirectly, through the means of monetary exactions, regulatory schemes which would fail under *Nollan's* principles.

SUMMARY OF ARGUMENT

As this Court's opinion in *Nollan v. California Coastal Commission* reflects, the concern there was with a "leveraging of the police power" as a means of achieving goals not sufficiently related to burdens or needs caused by a development project requiring a permit. 483 U.S. at 837 n.5. Unfortunately, under the view now adopted in California, this Court's *Nollan* decision can be sidestepped by merely leveraging the police power with demands for money rather than real property. *Nollan's* thrust is blunted and the principles announced in *Nollan* are reduced to little more than a "pleading requirement." "Cleverness and imagination" have proved successful after all.[1]

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[1] We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.

Nollan, 483 U.S. at 841.

Nollan stands for the proposition that there must be an "essential nexus" between an exaction demanded from an owner seeking a permit and some public burden or need created by the owner's proposed project. Absent this essential nexus, the demand represents nothing more than an outright attempt at extortion. *Nollan*, 483 U.S. at 837. Contrary to the holding of the California court below, such principles are as applicable to demands for money as they are to demands for land. And in both situations, the focus of the constitutional analysis is not so much on that which is being exacted as it is on the undue regulatory restriction placed on the use of land.[2] Although this point seems clearly made in *Nollan* (483 U.S. at 836-37), this Court's reasoning was totally lost on the court below. The court below simply failed to recognize that *any* prohibition on the use of land, imposed unless the owner acquiesces in a condition not adequately related to the owner's project, results in a *regulatory taking* which impacts *the owner's land*.

It is submitted that the views expressed by this Court in *Nollan*, including this Court's view as to the appropriate standard of review (483 U.S. at 835 n.3), would have been no different if the California Coastal Commission had there demanded money rather than an easement. The underlying constitutional principles are the same and it makes a sham of this Court's opinion to suggest that the California Coastal Commission could have succeeded by

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[2] As *Nollan* emphasized, absent an adequate nexus, the resultant "building restriction is not a valid *regulation of land use* but 'an out-and-out plan of extortion.' " *Nollan*, 483 U.S. at 837 (emphasis added).

demanding that the Nollans pay to another agency that amount of money needed to acquire the Nollan's beach by eminent domain. In either case, where there is not a sufficient nexus, the restriction on land use unjustifiably deprives the owners of the use of their real property. And in both cases, absent a sufficient nexus, the restriction fails to substantially advance a legitimate government interest. The result is a taking. *Nollan*, 483 U.S. at 834; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *See also Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 60 U.S.L.W. 4842, 4845 (June 29, 1992).

ARGUMENT

The California court below has taken a wrong turn down the constitutional pathway and has directed the state's trial courts to apply an artificial distinction which hopelessly confuses the constitutional principles involved. In so doing, the state court has immediately undermined the protections afforded by *Nollan* with respect to regulatory demands of a type which had so relentlessly been pursued in California before *Nollan*. To avoid *Nollan's* impact, and the degree of scrutiny required therein, future governmental demands will merely be couched in terms of: "Give me your land or give me your money."

The confusion and doubt spawned in California, caused by an opinion which seriously conflicts with applicable decisions of this Court on an important principle of constitutional dimension, surely should be

reviewed by this Court. In this regard, it must be remembered that the right to make reasonable use of property, free from extortive governmental demands, involves a matter of individual liberty and a basic civil right which should be jealously guarded by the courts.[3]

I

NOLLAN CANNOT BE ISOLATED AS A POSSESSORY TAKING CASE—THIS COURT THERE HAVING PURSUED A REGULATORY TAKINGS ANALYSIS

The court below found that a "threshold issue" to be addressed was whether "the *Nollan* nexus test should be applied to the case at bench." Petition, Appendix A-4. The court then characterized *Nollan* as a physical invasion case as it pursued the distinction this Court has made between possessory and regulatory takings.[4] The court

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[3] Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth a "personal" right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

[4] The court below said:

> However, the high court appears to make a distinction between "regulatory taking," *i.e.*, economic regulation, most forms of zoning, and other restrictions on land use, and "possessory takings," where the government, or an authorized third person, physically intrudes upon or appropriates the property.

Petition, Appendix A-5.

below thereupon held that *Nollan's* requirements are only applicable to possessory takings and hence only to exactions where the demand is for a possessory interest in real property. This is truly a confused reading of *Nollan* and creates a constitutional distinction in California contrary to the direction and reasoning employed by this Court.

This Court began its analytical discussion in *Nollan* by pointing out that if the Nollans had been "required" to grant an easement across their property, this undoubtedly would have resulted in a taking. *Nollan*, 483 U.S. at 831. When the Court, later in its opinion, reemphasized the point stating that "requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment" (*id.* at 834), the Court only stated a view quite consistent with its more recent holding in *Yee v. City of Escondido*, ___ U.S. ___, 60 U.S.L.W. 4301 (April 1, 1992).[5]

This Court in *Nollan*, however, saw the situation before it quite differently. The Court said that the question presented was "whether requiring [the easement] to be conveyed *as a condition for issuing a land-use permit* alters the outcome." *Nollan*, 483 U.S. at 834 (emphasis added). The Court then immediately launched into a discussion of regulatory takings law which can be traced back through such regulatory takings cases as *Agins v. City of Tiburon*, 447 U.S. 255; *Penn Central Transportation*

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[5] In *Yee*, the Court held that the "government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee*, 60 U.S.L.W. at 4303 (emphasis in original).

Co. v. City of New York, 438 U.S. 104 (1978); and to the case which first announced a regulatory takings doctrine—*Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). The Court in *Nollan* was thus using and applying a regulatory takings analysis when it adopted a higher level standard of review.[6] Indeed, this Court's conclusion that the appropriate standards in takings cases are not the same as those applied in due process or equal protection cases was based on the requirement that a regulation substantially advance legitimate state interests. *Nollan*, 483 U.S. at 834 n.3. This is an integral part of regulatory takings analysis. *See, e.g., Agins*, 447 U.S. at 260, and *Penn Central*, 438 U.S. at 127. Obviously, the higher level standard adopted in *Nollan* cannot be separated from this Court's regulatory takings analysis because the requirement is part and parcel thereof.

In this regard, it is important to note that this Court expressly found that an earlier assumption, contrary to its *Nollan* analysis, contained in *Goldblatt v. Hempstead*, 369 U.S.

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[6] *Yee* also seems to view *Nollan*, and its nexus requirement, as involving regulatory takings principles. The Court said:

> By contrast, petitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. *See Nollan v. California Coastal Comm'n, supra*, at 834-835. But it has nothing to do with whether the ordinance causes a physical taking.

Yee, 60 U.S.L.W. at 4304 (emphasis in original).

590 (1962), was "inconsistent with the formulations of our later cases." *Nollan*, 483 U.S. at 834 n.3. Yet, *Goldblatt* was a regulatory taking case. *Goldblatt* addressed a zoning ordinance regulating dredging and pit excavating within Hempstead's town limits. Obviously, there would have been no occasion to disapprove reasoning in a regulatory taking case if this Court intended its analysis in *Nollan* to be solely applicable to possessory takings cases.

Finally, it would seem that any doubt regarding *Nollan's* analysis is removed given the fact that issues regarding standard of review seem nonexistent in possessory takings cases. Permanent physical encroachment results in a *per se* taking—there is really nothing left to scrutinize. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, this Court found it unnecessary to examine whether the physical occupation there involved would substantially advance legitimate government interests or would result in severe economic impact—principal considerations in regulatory takings cases. The Court said:

> [O]ur cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

Id. at 434-35.

It thus seems that issues concerning standard of review or, for that matter, whether a "nexus" exists, disappear when the case involves a possessory rather than a regulatory taking. And it further seems apparent that the California court below seriously strayed from the

intended path when it pigeonholed *Nollan* as a physical invasion case.

Although many California regulatory agencies (including even the California Coastal Commission) continue to attempt to skirt *Nollan's* requirements, the effort generally has been rejected at least in cases demanding a real property exaction. For example, in *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260 (1991), a major effort was made to circumvent *Nollan's* principles. The attempt was spurned, the California appellate court there stating:

> *Nollan*, however, changed the standard of constitutional review in takings cases. Whether the new standard be described as "substantial relationship," or "heightened scrutiny," it is clear the rational basis test employed [previously in California] no longer controls.

Surfside Colony, 226 Cal. App. 3d at 1270.

Unfortunately, where an exaction calls for money rather than land, the opinion below now reflects a return of the California courts to their erroneous ways prior to *Nollan*. And if government agencies can get around *Nollan* by demanding money rather than real property, then *Nollan* is rendered meaningless. There is no analytical basis for distinguishing between real and personal property—at least not in this context where the constitutional focus is on the regulation of real property.

II

THE HOLDING BELOW RESULTED FROM A CONCEPTUALLY CONTORTED EFFORT TO DISTINGUISH NOLLAN

Isolating *Nollan* as a physical invasion case creates a terrible confusion in the law applicable to takings. In *any* land use permit exaction case, the right which is involved is the right to make reasonable use of one's real property without being subjected to unwarranted restrictions. Even the California courts have recognized that "an *undue* restriction on the use of private property is as much a taking for constitutional purposes as appropriating or destroying it." *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission*, 11 Cal. App. 3d 557, 572 (1970) (emphasis in original). But the California courts, before *Nollan*, began to uphold severe regulatory demands based on the rationalization that the issuance of a permit results in a "governmental benefit" for which a *quid pro quo* can be demanded. *See, e.g., Grupe v. California Coastal Commission*, 166 Cal. App. 3d 148, 176-77 (1985). However, this Court in *Nollan* solidly rejected the theory stating that "the right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.' " *Nollan*, 483 U.S. at 833 n.2. Were it otherwise, and as observed in *Nollan* (483 U.S. at 837 n.5), stringent land use regulations could readily be invoked solely for the reason that a waiver thereof could be traded for the concession being demanded. Such considerations are, of course, as applicable to monetary exactions as they are to any other form of exaction.

In short, this Court's concern in *Nollan* did not relate to whether the concession demanded for permit approval

would result in physical occupation of the property. The concern in *Nollan* was whether the concession demanded was legitimately related to public needs or burdens created by the proposed development because, if not, it would have to be viewed as imposing an improper restriction on the Nollans' right to make reasonable use of their real property. The distinction attempted below simply does not mesh with the legal principles involved. An inadequately related demand for money is just as wrong as an inadequately related demand for real property.

CONCLUSION

Local regulatory actions, which impose substantial fees on property owners as a condition of improving their properties, cannot be immunized from the judicial scrutiny required by *Nollan*. If the courts look the other way, and avoid the glare of what is really happening, they effectively will have delegated a responsibility to protect individual rights to the regulating agencies themselves—agencies whose primary interest is to fund their projects. In the absence of an adequate nexus, justified under the principles established in *Nollan*, any demand for a tribute, be it land or money, improperly seeks to force some people alone to bear a public burden which, in all fairness and justice, should be borne by the public as a whole. This Court has repeatedly stated that the very purpose of the Takings Clause is to prevent any such result. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 49 (1960), and *First*

English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318-19 (1987).

The petition for writ of certiorari should be granted.

DATED: August, 1992.

Respectfully submitted,

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